

Erik F. Stidham, ISB #5483
efstidham@stoel.com
G. Rey Reinhardt, ISB #6209
grreinhardt@stoel.com
STOEL RIVES LLP
101 South Capitol Boulevard, Suite 1900
Boise, ID 83702-5958
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

U.S. COURTS
04 JUL 22 PM 1:36
CLERK
IDAHO

Scott J. Kaplan, Pro Hac Vice
sjkaplan@stoel.com
Darian A. Stanford, Pro Hac Vice
dastanford@stoel.com
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

Case No. CV-03-450-E-LMB

DEFENDANT/THIRD-PARTY
PLAINTIFF INTERDENT SERVICE
CORPORATION'S OPPOSITION TO
DR. LARRY BYBEE'S AND VALLEY
DENTAL'S MOTION TO QUASH

INTERDENT SERVICE CORPORATION, a
Washington corporation,

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S
OPPOSITION TO DR. LARRY BYBEE'S AND VALLEY DENTAL'S MOTION TO
QUASH - 1

Portlnd3-1487498.1 0021164-00081

Third-Party Plaintiff,

v.

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation; DWIGHT G.
ROMRIELL, individually; LARRY R.
MISNER, JR., individually; PORTER
SUTTON, individually; ERNEST SUTTON,
individually; GREGORY ROMRIELL,
individually; ERROL ORMOND,
individually; and ARNOLD GOODLIFFE,
individually,

Third-Party Defendants.

I. INTRODUCTION

As detailed in defendant/third-party plaintiff InterDent Service Corporation's ("ISC") pending TRO papers, third-party defendant Dr. Larry Misner and his associate Dr. Larry Bybee testified that notwithstanding their objections to "foreign for-profit corporations" managing dental offices, they in fact took the knowledge and business they developed at the practice managed by ISC and opened a competing office on the same street in Pocatello managed by an ISC competitor, Louisiana-based Orthodontic Centers of America ("OCA."). Because Misner has a direct noncompete agreement with ISC, he and Bybee, possibly with OCA's assistance, carefully structured this transaction by creating a new corporation, Valley Dental, with Dr. Bybee as the sole shareholder and Dr. Misner as only an officer and employee. (Deposition of Larry Bybee ("Bybee Depo.") at 12-14.)¹

¹ Cited portions of the Bybee Depo. transcript are attached to the Affidavit of Scott J. Kaplan in Opposition to Dr. Larry Bybee's and Valley Dental's Motion to Quash ("Kaplan Aff.") as Exhibit 2.

As a result of this sleight of hand, none of the records relating to the relationship between OCA and Misner are in Misner's possession. Instead, they are in the possession of Bybee and his corporation, Valley Dental. Consequently, ISC was required to issue the subpoenas at issue in this motion. Bybee and Valley Dental (collectively "Bybee"), not surprisingly represented by Misner's counsel, thereupon moved to quash with little explanation of the basis for their motion. From what ISC can determine, they object to the place of production but forget that it is only a document subpoena. Moreover, they object to the place of production, Boise, even though it is within the District of Idaho and so permissible under the Federal Rules. However, had Bybee's counsel met and conferred before filing, ISC would have explained that the place of production could be as convenient to them as the closest post office.

On the merits, all plaintiffs say is that Bybee does not have a direct noncompete agreement with ISC (which is, of course, why they structured their business as they did.) Because Bybee's employee and co-officer in Valley Dental, Misner, does have a direct noncompete, Bybee unquestionably has evidence reasonably calculated to lead to the discovery of admissible evidence relating to Misner. Bybee has no excuse for disregarding the duty of every citizen to provide evidence in pending legal proceedings.

II. ARGUMENT

A. Bybee's Motion Should Be Denied for Violation of Civil Rule 37.1

Civil Rule 37.1 requires counsel to make a reasonable effort to reach agreement before filing a discovery motion and to state as much in their motion. Bybee does neither. Counsel did discuss the merits, such as they are, of Bybee's motion, but Bybee's (and Misner's) counsel never mentioned any objection to the place of production. (Kaplan Aff. ¶ 2.) Had they done so,

ISC's counsel would have explained that the documents could simply be mailed, and these proceedings might have been unnecessary. (*Id.*) Because of this violation of the local rules, the motion should be denied and ISC awarded its fees and costs in responding to the motion.

B. The Place of Production Is as Close as the Nearest Post Office

Pocatello is within the District of Idaho, as is Boise. The production of documents in Boise to which Bybee objects is therefore permitted by Fed. R. Civ. P. 45(b)(2). In any event, had Bybee's counsel complied with Civil Rule 37.1, counsel would have been directed to Fed. R. Civ. P. 45(c)(2)(A), which provides that "a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear. . . ." ISC's counsel would have explained that there was no such commandment to appear. (Kaplan Aff. ¶ 2.) Rather, copies of the documents could simply be mailed to the address in Boise of ISC's counsel stated on the subpoena, relieving Bybee of any alleged expense or inconvenience.

C. The Documents Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Although Bybee is not (yet)² a party to this case, this does not relieve him of his duty of responding to a lawful subpoena—whether or not he had a direct contractual relationship with ISC. Misner and Bybee intentionally structured their business relationship so that Bybee had possession of documents relating to Misner's relationship with OCA and the financial harm their

² Bybee is potentially liable for aiding and abetting Misner's breach of his noncompete agreement.

competition is doing to ISC. They cannot claim any surprise on unmerited inconvenience resulting from the structure by which they chose to do business.

The standard for discovery is very broad. The documents sought need not be discoverable in themselves but need only be reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). The documents subpoenaed by ISC and the bases for the requests are as follows:

1. Request No. 1

a. Description of Documents Requested

The management agreement and all other contracts between you and Orthodontic Centers of Idaho, Inc. and any affiliated company, including but not limited to Orthodontic Centers of America.

(i) Basis for Request

Misner and the Pocatello Dental Group ("PDG") shareholders contend in this case that the management agreement between Bybee and PDG constitutes the unlawful practice of dentistry. There is evidence in the record that these arguments are merely a pretext for the PDG shareholders' attempts to evade their noncompete agreements. (Affidavit of Kevin Webb in Support of ISC's Motion for a Temporary Restraining Order (Misner Noncompete), Ex. 3.) The management agreement between Bybee and OCA may show, for example, that Misner's complaints are indeed pretextual if *during the pendency of these proceedings* he and Bybee entered into a substantially similar agreement with OCA. The OCA agreement may also support ISC's argument that the provisions of its management are commonplace and standard in the industry.

Moreover, Bybee has submitted an "expert report"³ putting Valley Dental documents directly at issue in this case by contending that ISC should follow the same practices as his OCA/Valley Dental office. This report even includes invoices to OCA "accounts payable, Metairie, Louisiana, LA 70002-8127." (Kaplan Aff. Ex. 1 at 9-13.) One of PDG's complaints in this case is that ISC also handles accounting functions from a central business office rather than in Pocatello. Bybee not only has waived any objection to the discovery sought but also highlighted its relevance.

Misner also contends that his noncompete agreement with ISC is unenforceable. If during the pendency of these proceedings he or Bybee entered into similar noncompete agreements with OCA, this also would tend to prove the pretextual nature of Misner's contentions.

2. Request No. 2

a. Description of Documents Requested

The business plan you submitted to Wells Fargo to obtain financing.

(i) Basis for Request

This plan made forecasts about the business Misner and Bybee would do as Valley Dental, a large percentage of which they expected would formerly have gone to the PDG/ISC office. (Bybee Depo. at 25-27.) The documents are therefore discoverable on the issue of damages.

³ Excerpts cited are attached to the Kaplan Aff. as Exhibit 1.

3. Request No. 3

a. Description of Documents Requested

Documents identifying all current or former Pocatello Dental Group patients seen by you.

(i) Basis for Request

These documents will assist in the calculation of ISC's damages.

4. Request No. 4

a. Description of Documents Requested

Documents identifying all revenues received by you for or from all current or former Pocatello Dental Group patients seen by you.

(i) Basis for Request

These documents will assist in the calculation of ISC's damages.

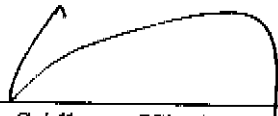
The documents sought by ISC are therefore both discoverable and highly probative to the contentions made in this action by Misner and the other PDG shareholders and by PDG itself.

III. CONCLUSION

Bybee's and Valley Dental's motion should be denied.

DATED: July 21, 2004.

STOEL RIVES LLP



Erik F. Stidham, ISB #5483
G. Rey Reinhardt, ISB #6209
Scott J. Kaplan, pro hac vice
Darian A. Stanford, pro hac vice

Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S
OPPOSITION TO DR. LARRY BYBEE'S AND VALLEY DENTAL'S MOTION TO
QUASH - 7

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S OPPOSITION TO DR. LARRY BYBEE'S AND VALLEY DENTAL'S MOTION TO QUASH** on the following named persons on the date indicated below by

- ☒ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☐ overnight delivery

to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at his or her last-known addresses indicated below.

Gary L. Cooper
Ron Kerl
COOPER & LARSEN
151 North Third Avenue, Suite 210
PO Box 4229
Pocatello, ID 83205-4229
Telephone: (208) 235-1145
Fax: (208) 235-1182
gary@cooper-larsen.com
ron@cooper-larsen.com
jim@cooper-larsen.com

Attorneys for Plaintiff/Third-Party
Defendant Pocatello Dental Group, P.C.

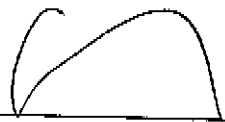
Lowell N. Hawkes
LOWELL N. HAWKES, CHARTERED
1322 East Center
Pocatello, ID 83201
Telephone: (208) 235-1600
Fax: (208) 235-4200
hox@nicoh.com

Attorney for Third-Party Defendants
Dwight G. Romriell, Gregory Romriell,
Errol Ormond and Arnold Goodliffe

DATED: July 21, 2004.

Richard A. Hearn
Stephen J. Muhonen
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
PO Box 1391/Center Plaza
Pocatello, ID 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109
rah@racinelaw.net
sjm@racinelaw.net

Attorneys for Third-Party Defendant
Dr. Larry R. Misner, Jr., Dr. Ernest
Sutton and Dr. Porter Sutton



Scott J. Kaplan, Pro Hac Vice
Attorneys for Defendant/Third-Party Plaintiff
InterDent Service Corporation